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No. 08-

IN THE

Supreme Court of the United States

ROGER DALE LEWIS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held—in conflict with four circuits and in accord with six others—that a prosecutor may withhold exculpatory information that would otherwise have to be disclosed under *Brady* v. *Maryland*, 373 U.S. 83 (1963), simply because the information theoretically resides somewhere in the public domain.

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PETITION FOR A WRIT OF CERTIORARI

Roger Dale Lewis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion is unreported; it is available electronically on Westlaw at 2008 WL 698935. App. 1a. The District Court's opinion is reproduced at App. 69a.

JURISDICTION

The Sixth Circuit's opinion issued on March 14, 2008. On June 2, 2008, Justice Stevens extended the time to file the petition for certiorari to and including

July 28, 2008. App. 110a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

This Court has held time and again that "[a] rule * * * declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks* v. *Dretke*, 540 U.S. 668, 696 (2004). Under *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), and its progeny, a prosecutor must disclose all evidence—exculpatory and impeachment—which, "if disclosed and used effectively, * * * may make the difference between conviction and acquittal." *United States* v. *Bagley*, 473 U.S. 667, 676 (1985). It is an "affirmative duty," *Kyles* v. *Whitley*, 514 U.S. 419, 432 (1995), and one that "illustrates the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999).

The regional courts of appeals, however, are hopelessly divided over an important and recurring question: whether a prosecutor is relieved from his "affirmative duty" to disclose exculpatory material under *Brady* simply because that evidence exists somewhere—anywhere—in the public domain. Seven circuits—including the Sixth Circuit below—have held that a prosecutor indeed bears no burden to disclose evidence that is otherwise material and

exculpatory so long as it lurks somewhere in the bowels of a public repository. Four circuits—the Fourth, Fifth, Ninth, and Eleventh—have rejected that approach. In those circuits, "if the State fail[s] under a duty to disclose the evidence, then its location in the public record * * * is immaterial." *Johnson* v. *Dretke*, 394 F.3d 332, 335 (5th Cir. 2004). And that is particularly true if, as in this case, defense counsel relied "on affirmative representations by the prosecution that it was keeping the defense apprised of developments in the investigation." *Gantt* v. *Roe*, 389 F.3d 908, 913 (9th Cir. 2004).

The Sixth Circuit below endorsed the majority view in rejecting petitioner's *Brady* claim. That claim was based on the undisputed fact that the prosecutor withheld a key document disclosing the lengthy criminal and fraudulent history of the prosecution's "key witness." App. 1a. The prosecutor withheld this key impeachment evidence, even though he had expressly assured defense counsel that "[t]here is no exculpatory or mitigating evidence known to the State at this time, * * * [and] if additional discovery becomes available you will be advised promptly." CAJA 270. But the Sixth Circuit, in square conflict with four other circuits, held that "the state's failure to turn over the [criminal] records * * * was not a *Brady* violation because those records were publicly available and the petitioner could have obtained them." Pet. 5a.

In reaching that result, the court relied on its recent *en banc* decision in *Bell* v. *Bell*, 512 F.3d 223 (6th Cir. 2008). Reflecting the broader division in the regional courts of appeals, the Sixth Circuit split 6-5 on the question presented in *Bell*. A petition for

a writ of certiorari in that case is currently pending on this Court's docket. *See* No. 07-1506 (filed June 2, 2008). This Court should grant the petitions in *Bell* and in this case and consolidate them for argument. At the very least, this Court should hold this petition pending the disposition of the *Bell* petition.

STATEMENT OF THE CASE

1. In October 1992, the State of Tennessee arrested petitioner Roger Dale Lewis for allegedly setting a fire in an apartment unit. *Lewis* v. *State*, No. M2002-02439-CCA-R3-PC, 2003 WL 22438526, at *1 (Tenn. Crim. App. Oct. 28, 2003). While being held at Sumner County jail, Lewis shared a cell with Ernest Bishop. There, anytime Lewis was not in the bunk, Bishop had access to the search warrant and supporting affidavit detailing the State's case against Lewis. Bishop would become the "key witness" at Lewis's arson trial, testifying that Lewis had confessed to him. App. 1a.

In preparation for trial, Lewis's trial counsel requested from the State—citing *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963)—"any and all evidence in possession of the State or in possession of any governmental agency that might be termed favorable," including evidence that "might favorably be used by the defendant to impeach the credibility of any witness the government intends to call." CAJA 266.

The State prosecutor insisted that he had no such information for the defense. In a written response to Lewis's attorney, the prosecutor expressly assured defense counsel that "[t]here is no exculpatory or mitigating evidence known to the State at this time."

CAJA 270. He then went on to promise Lewis's attorney that "if additional discovery becomes available you will be advised promptly." *Id.*

But the prosecutor did indeed have *Brady* information in his file: a copy of Bishop's report from the National Crime Information Center (NCIC). That report would have been crucial for defense counsel because it chronicled the four-decade long criminal history of Bishop—whom the prosecution touted to the jury as his "key witness." CAJA 83. Had the prosecutor disclosed the NCIC report, defense counsel would have known, for example, that Bishop had criminal charges dating back to 1961, including attempted rape, breaking and entering, and theft. Perhaps even more crucial—given that the prosecution's case hinged on Bishop's credibility and testimony—was information in the NCIC report indicating that Bishop had used a dozen different aliases, each with its own fraudulent Social Security Number. App. 2a-3a.

At trial, defense counsel tried to impeach Bishop on cross examination by asking Bishop if he had been convicted of a felony in the past ten years. Bishop testified that he was "not sure" how many felonies he had been convicted of or whether he had been convicted of a felony in the last ten years. App.2a; CAJA 128-129. Without the NCIC report, defense counsel was unable to impeach Bishop regarding his criminal history and his penchant for fraud and deception. App.2a; CAJA 132.

Lewis was convicted of five counts of aggravated arson, which was subsequently reversed as to four counts. *State* v. *Lewis*, 958 S.W.2d 736 (Tenn. 1997). He was ultimately sentenced to 21 years in prison. *State* v. *Lewis*, 44 S.W.3d 501 (Tenn. 2001).

2. In his state post-conviction proceedings, Lewis asserted, *inter alia*, that the State denied him *Brady* material by withholding Bishop's NCIC report. *Lewis* v. *State*, 2003 WL 22438526, at *7 (Tenn. Crim. App. Oct. 28, 2003). The court noted that "[t]he state has offered no explanation why the information was not provided to the defense," and it found that "the information about Bishop is imbued with impeachment value." *Id.* But the court found it "highly unlikely" that the jury was "favorably impressed with Bishop's honesty or reliability" under the cross examination that defense counsel conducted, even without the NCIC report. *Id.* at *9. It thus denied post-conviction relief on the basis that the suppressed impeachment material did not "undermine confidence in the jury's verdict." *Id.* at *8.

Lewis then filed a *pro se* habeas petition with the United States District Court for the Middle District of Tennessee. The District Court found that the state court's analysis of the *Brady* violation "skate[d] perilously close to a sufficiency of the evidence test"—which is not the proper analysis. App. 96a. But it nevertheless denied the *Brady* claim. App. 99a. The District Court granted a partial certificate of appealability regarding the *Brady* claim, as well as a prosecutorial misconduct claim. App. 70a.

3. On appeal, the Sixth Circuit held that whether a *Brady* violation had occurred in Lewis's case was governed by that court's recent *en banc* decision in *Bell* v. *Bell*, 512 F.3d 223 (6th Cir. 2008), *cert. petition filed June 2, 2008*, No. 07-1506. App. 5a. In *Bell*, the prosecution failed to turn over certain "public sentencing records" showing that the district attorney had elected to drop certain pending charges

against an individual who testified at the defendant's trial; the *Bell* defendant argued that the district attorney dropped the charges in return for testimony, and that this treatment amounted to favorable impeachment evidence that the prosecution was required to disclose under *Brady*. App. 25a, 30a-31a.

The *en banc* court splintered 6-5, with the majority finding no *Brady* violation. In reaching that result, the six-judge majority articulated a bright-line rule of decision: the prosecution has no duty to disclose information that would otherwise qualify as *Brady* material if the information is "readily available to the defense from another source." App. 31a. The five dissenting judges categorically rejected that rule. App. 44a. In the dissent's view, the public availability of *Brady* material does not excuse the prosecutor's independent obligation under this Court's precedents to hand over all exculpatory material in his or her possession.

4. The Sixth Circuit panel that decided Lewis's appeal below found that it was bound by *Bell*. According to the panel, because Lewis met Bishop in prison and knew Bishop was subject to extradition to Texas, Lewis could have independently investigated " 'any pending charges against [Bishop] and their disposition.' " App. 5a (quoting *Bell*, 512 F.2d at 235) (alternation by panel). The panel thus concluded that there was no *Brady* violation by the State's failure to turn over Bishop's NCIC report.[1]

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[1] The panel did not address the fact that the NCIC report included Bishop's *31-year history* of criminal charges and their resolution—not merely those charges that were "pending" while he awaited extradition to Texas as Lewis's bunkmate. Nor did the panel explain how an NCIC report is considered a publicly

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH AND UNDERMINES THIS COURT'S PRECEDENT.

The Sixth Circuit has endorsed a rule that licenses prosecutors to withhold exculpatory or impeachment materials—even while assuring a criminal defendant that all such material has been turned over—so long as the information withheld could be obtained from some publicly available source. That rule conflicts with this Court's decisions in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), *Strickler* v. *Greene*, 527 U.S. 263, 266, 276, 289 (1999), and *Banks* v. *Dretke*, 540 U.S. 668, 695 (2004).

1. This Court's precedents have consistently sought to eliminate prosecutorial deception and gamesmanship. The government's obligation in a criminal prosecution "is not that it shall win a case, but that justice shall be done"; therefore, while the government "may strike hard blows, [it] is not at liberty to strike foul ones." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). To avoid "foul blows" by the prosecution, this Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due

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available document that defense counsel could procure through independent investigation. There are in fact strict limits on who is authorized by law to access the NCIC databases or generate reports. *See, e.g.*, "Use and Management of Criminal History Record Information: A Comprehensive Report," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics at 51 (1993); "Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics at 75-76 (2001).

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

In the years since *Brady* was decided, this Court has reaffirmed the strict disclosure obligations that prosecutors must honor in every case. For example, in *United States* v. *Bagley*, 473 U.S. 667 (1985), this Court extended *Brady* to cover "impeachment evidence," because, "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676; *see Giglio* v. *United States*, 405 U.S. 150, 154 (1972). And the Court has confirmed that defense counsel need not even request exculpatory material; the prosecutor instead has an affirmative obligation to disclose evidence "if there is a reasonable probability that that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995) ("regardless of request, favorable evidence is material, and constitutional error results from its suppression").

2. In *Strickler*, and again in *Banks*, this Court rejected rules that—like the Sixth Circuit's rule—would relax the "prosecution's affirmative duty to disclose evidence favorable to a defendants." *Kyles*, 514 U.S. at 682. In *Strickler*, as in this case, the prosecutor failed to turn over evidence that could have been used to impeach a key prosecution witness. The failure to disclose that evidence was compounded by the fact that the prosecutor purported to have maintained an "open file" policy—meaning that defense counsel was free to examine what was supposed to be the prosecutor's entire case file. *See Strickler*, 527 U.S. at 283. The State

nevertheless insisted that maintaining "an open file policy that did not include all it was supposed to contain is irrelevant because the factual basis for the assertion of a *Brady* claim was available to * * * counsel." *Id.* at 284-285.

This Court disagreed and found that the defendant had established cause for failing to raise his *Brady* claim earlier. The Court concluded that the "nondisclosure and the open file policy [ ] are both fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim." *Id.* at 283. After all, "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." *Id.* at 283 n.23.

So too here. The prosecutor below asserted that he had complied with *Brady*, not through an open-file policy, but by expressly telling defense counsel that "[t]here is no exculpatory or mitigating evidence known to the State at this time * * * [and] if additional discovery becomes available you will be advised promptly." CAJA 270. Under *Strickler*, Lewis's defense counsel was entitled to "reasonably rely on" that representation to mean just what it said: that "all materials the State [wa]s constitutionally obligated to disclose" either did not exist or would be produced if later discovered. *Strickler*, 527 U.S. at 283 n.23. Having been assured that no such *Brady* material existed, defense counsel was under no obligation to spend precious resources investigating whether the prosecutor in fact possessed material exculpatory information. But by adopting a rule that transforms the prosecutor's

"affirmative duty" to disclose exculpatory information, *Kyles*, 514 U.S. at 432, into a purely voluntary one so long as the information may be found elsewhere, the decision below squarely conflicts with *Strickler*.[2]

In *Banks*, the State likewise withheld impeachment materials about a key witness, despite stating that it would disclose all discoverable *Brady* material. *Banks*, 540 U.S. at 693. Once again, this Court rejected such a gambit. It held that the Court's "decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. And with a holding that all but answers the question presented in this case, the Court held that any "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696.

3. *Brady*, *Strickler*, and *Banks* all confirm that a criminal trial is not an opportunity for a prosecutor to play hide-and-seek with exculpatory or impeachment materials. The prosecution is constitutionally duty-bound to turn over—and not

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[2] Although this Court reserved decision on whether the analysis would change if the defendant knew about and could reasonably discover how to obtain specific withheld documents, *id.* at 288 n.33, its holding in *Strickler* did not turn on whether the defendant could have discovered a factual basis for its claims; the fact that the prosecution withheld evidence and the defendant relied on assertions that all evidence had been disclosed was enough to establish cause for not raising a *Brady* claim in state court proceedings. See *id.* at 289 (summarizing the holding without mentioning any obligations for the defendant beyond relying on the prosecution's statements).

suppress—all such materials in its possession, regardless of whether, how, or if defense counsel might independently know to look for and be able to uncover similar information through launching an independent investigation into the matter. This Court, in short, has never held that a prosecutor may circumvent his *Brady* obligations simply because the evidence may lurk elsewhere in the public domain.

The Sixth Circuit, however, has done just that. In *Bell*, and again in *Lewis*, the Sixth Circuit mistakenly focused on the defendant's ability to find the information some other way—rather than on whether the prosecution had suppressed materials in its possession. The *Bell* court dismissed *Strickler* and *Banks* as not controlling because those cases did not involve information akin to the public sentencing records at issue in *Bell*. 512 F.3d at 235. That court's holding—that a defense counsel must scour the public record as well as canvas all available sources for exculpatory or impeachment material and is precluded from relying on a prosecutor's assurances that all *Brady* materials have been disclosed—squarely conflicts with this Court's precedents.

Where this Court has consistently rejected gamesmanship by prosecutors in these circumstances, the Sixth Circuit has chosen to invite more of it. The *Bell* and *Lewis* decisions effectively carve out of the government's duty to disclose a vast array of materials that may be obtainable from another source—thereby forcing defense counsel to jump down rabbit hole after rabbit hole, even when the prosecutor has promised all *Brady* material has been disclosed.

The decision below turns this Court's decisions in *Brady* and its progeny on their head: whereas this Court consistently places the burden of disclosure on the prosecution and permits defense counsel to rely on assurances of full disclosure, the Sixth Circuit requires defense counsel to invest the time, energy, and resources required to verify whether the prosecutor really meant it when he said that all *Brady* material had indeed been disclosed. Allowing such a game of hide and seek directly contradicts this Court's well-established precedent and threatens to reintroduce the type of prosecutorial gamesmanship supposedly eradicated by *Brady*. The Court should grant the petition to resolve that conflict. *See* S. Ct. Rule 10(c) (one of the principal considerations governing the exercise of certiorari jurisdiction is whether a court of appeals "has decided an important question in a way that conflicts with the relevant decisions of this Court").

II. THE RULING BELOW INTENSIFIES AN ALREADY DEEP DIVISION AMONG THE CIRCUITS

The Sixth Circuit's decision deepens an entrenched circuit split over whether a State may disregard its *Brady* obligations whenever the evidence is theoretically available somewhere in the public record. Lewis was denied his habeas claim below because the Sixth Circuit excused the prosecution's failure to turn over the NCIC report documenting decades of criminal and fraudulent activity by its key witness on the theory that Lewis could have obtained the NCIC report some other way. App. 5a.[3] That

[3] Because defense counsel do not generally have access to the NCIC database, which can be accessed only by limited groups of users—mostly law enforcement—the court seems to

same rule has been embraced by the First, Second, Third, Seventh, Eighth, and Eleventh Circuits. In sharp contrast, the Fourth, Fifth, Ninth, and Tenth Circuits have reached the opposite result. The practical impact of this sharp 7-4 split is that prosecutors in some states are licensed to withhold certain exculpatory or impeachment evidence, while their counterparts in neighboring states are constitutionally obligated to disclose the exact same type of evidence. Fundamental due-process rights should not turn so arbitrarily on accidents of geography. This Court should grant certiorari to resolve this intractable conflict. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals.").

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have held that defense counsel would have had to independently search the public records of every jurisdiction in which Bishop had a criminal record as of 1992, including Indianapolis, Indiana; Batavia, New York; Angola, New York; Tampa, Florida; La Grange, Kentucky; Dayton, Ohio, Charleston, West Virginia; Michigan City, Indiana; Gallatin, Tennessee, to recreate the NCIC report that the prosecution failed to disclose. CAJA 167-184. *See, e.g.*, *United States* v. *Fowler*, 2007 WL 2156560, at *8 (E.D. Wis. July 25, 2007) ("Unlike defense counsel, the government has access to these records through the NCIC system."). Alternatively, this particular criminal defense attorney could possibly have used his status as an adjunct professor at the Tennessee Law Enforcement Training Academy to request that his "contacts" there run an NCIC report on Bishop for him, although defense counsel was unsure the Academy's computer was capable of running an NCIC report. CAJA 146.

A. Four Circuits Have Ruled—Contrary To The Sixth Circuit's Holding—That A Prosecutor's Duty To Disclose Exculpatory Evidence Is Absolute And Does Not Turn On Whether The Evidence Is Publicly Available.

The decision below squarely conflicts with the four courts of appeals that have concluded that the due-process analysis under *Brady* focuses on whether prosecutorial misconduct occurred—not on whether defense counsel could have mitigated the harm from that misconduct through independent investigation. These courts hold that whether a *Brady* violation occurs turns on three, and only three, factors: whether "(1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material." *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999); *see, e.g.*, *Walker* v. *Kelly*, 195 Fed. Appx. 169, 174-175 (4th Cir. 2006); *Johnson* v. *Dretke*, 394 F.3d 332 (5th Cir. 2004); *Gantt* v. *Roe*, 389 F.3d 908, 913 (9th Cir. 2004). In these courts, the analysis focuses solely on whether the prosecutor concealed documents or materials it was required to disclose under *Brady* without any inquiry into where those documents or materials existed outside the prosecutor's files.

Fourth Circuit. In *Walker*, the prosecutor argued that, even though he had withheld material exculpatory information from the defendant, there was nevertheless no *Brady* violation "since [the defendant] could have reasonably discovered all the information" from other sources. *Walker*, 195 Fed. Appx. at 175. The Fourth Circuit initially agreed, relying on earlier decisions that adopted a rule that

was virtually indistinguishable from the one endorsed by the Sixth Circuit in *Lewis* and *Bell*. *See, e.g.*, *United States* v. *Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) ("[W]here the exculpatory information * * * lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."). But on remand from a GVR instructing the Fourth Circuit to reconsider in light of this Court's decision in *Banks*, 546 U.S. 1086 (2006), the Court of Appeals held that the prosecutor had violated *Brady* by failing to disclose exculpatory evidence—regardless of whether it was publicly available or not.

In reaching that result, the Fourth Circuit announced a rule that squarely conflicts with the approach that the Sixth Circuit has embraced. It held that the proper analysis "focuses on prosecutorial misconduct, not on the defendant's diligence." *Walker*, 195 Fed. Appx. at 175. Any other focus, the court explained, would "condone[ ] the prosecutor's ability to conceal documents and require[ ] a defendant to search for Brady material." *Id.* That is particularly true—as in Lewis's case—where the prosecutor affirmatively assures the defendant that no exculpatory evidence exists. As the Fourth Circuit emphasized, a defendant is "reasonable not only in relying on the presumption that the Commonwealth would faithfully perform its duty to disclose, but also in relying on the explicit representation that the prosecution had disclosed all *Brady* material." *Id.* at 174.

Fifth Circuit. The Fifth Circuit likewise does not recognize a public-availability exception to *Brady*. In *Johnson* v. *Dretke*, the State neglected to disclose a stipulation in which a co-defendant confessed to

being the triggerman. The State tried to justify its *Brady* violation by pointing out that the stipulation was available in the public record, but the Fifth Circuit flatly rejected the argument. Instead, it adopted a bright-line and easy-to-administer rule that gives full effect to the "affirmative duty" that prosecutors have to disclose exculpatory material under this Court's precedents: "If the State fail[s] under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial." *Johnson*, 394 F.3d at 337; *see Mathis* v. *Dretke*, 124 Fed. Appx. 865, 877 (5th Cir.), *cert. denied*, 545 U.S. 1131 (2005) (the State "ha[s] no duty to disclose exculpatory evidence that was available in the public record.").

Ninth Circuit. The Ninth Circuit, like the Fourth and Fifth Circuits, holds that the duty to disclose under *Brady* is a duty of the State, and its violation is determined solely by analyzing the State's conduct. *See, e.g.*, *Gantt*, 389 F.3d at 913. In *Gantt*, as in Lewis's case below, the prosecutor assured defense counsel that all *Brady* material had been turned over, when in fact some exculpatory evidence had been withheld. On behalf of a unanimous panel, Judge Kozinksi held that, while a more diligent defense counsel might have been able to independently obtain the information, that "does not absolve the prosecution of its *Brady* obligations." *Id.* at 913. That was particularly so because defense counsel "was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.*; *see also Atkins* v. *County of Riverside*, 151 Fed. Appx. 501, 504 n.2 (9th Cir. 2005) (access to allegedly fabricated evidence did not "absolve[] the government of any

Brady duty of disclosure" to inform defense counsel of alleged fabrication for impeachment purposes).

Tenth Circuit. The Tenth Circuit's precedents hew to this same rule. In that circuit, "whether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information." *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (10th 1999); *see also Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) ("the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge"); *Scott* v. *Mullin*, 303 F.3d 1222, 1229 (2002) ("It is not a petitioner's responsibility to uncover suppressed evidence."). The Tenth Circuit's decision in *Banks* directly rejected the State's argument that the availability of another source could defeat the prosecution's duty to disclose under *Brady*; in so holding, the Tenth Circuit acknowledged that its rule (the same rule applied in the Fourth, Fifth and Ninth Circuits) conflicts with the rule applied in other circuits. 54 F.3d at 1517 n.17. This Court should grant certiorari to resolve that conceded conflict.

B. Seven Circuits Hold That Whether A State May Suppress Evidence Under *Brady* Turns On Where Else That Evidence Might Exist.

On the other side of the circuit split, the First, Second, Third, Sixth, Seventh, Eighth, and Eleventh Circuits hold a State's suppression of evidence in violation of *Brady* may be excused if the defendant could theoretically have come across the evidence some other way.

The Third Circuit has held that a State has no duty to provide a defendant with information that "with any reasonable diligence he can obtain himself." *United States* v. *Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005). Applying that standard in *United States* v. *Joyce*, 257 Fed Appx. 501, 504-505 (3d Cir. 2007), the Third Circuit ruled that prosecutors who "fail[ed] to disclose [a potential witness's] conviction and produce summaries of its interviews with him" nevertheless "did not suppress" evidence in violation of Brady. *Id.* at 504. The court reasoned defense counsel should have "periodically searched the criminal dockets of the federal district courts in the Eastern District of Pennsylvania or the District of New Jersey, the two jurisdictions in which they knew, or could have known with reasonable diligence, that [the potential witness] was under criminal investigation." *Id.* at 505. In the Third Circuit, it is "fatal" to a *Brady* claim if the defendant had "knowledge of, or access to, purportedly exculpatory material." *Pelullo*, 399 F.3d at 215.[4]

The Eleventh Circuit has adopted this same approach. *See United States* v. *Meros*, 866 F.2d 1304,

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[4] The Third Circuit has shifted course from its original view of this issue, which focused on the "annoying frequency with gamesmanship by some prosecutors with respect to the duty to disclose." *United States* v. *Oxman*, 740 F.2d 1298 (3d Cir. 1984), *vacated by United States* v. *Pflaumer*, 473 U.S. 922 (1985). *Compare Oxman*, 740 F.2d at 1312 ("[I]t is not the law that exculpatory evidence in the government's file is not *Brady* material if the defendant might have uncovered it through independent sources."), *with Joyce*, 257 Fed. Appx. at 504 ("It is well-established that *Brady* does not impose upon the Government the duty to provide a defendant 'with any information which he already has or, *with any reasonable diligence*, he can obtain himself.' ") (internal citations omitted).

1309 (11th Cir. 1989) ("[T]he government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.") (internal quotations omitted). The court has gone so far as to hold that the defense's mere knowledge of a potential exculpatory witness excuses the State from its duty to disclose exculpatory statements made by the witness. *See Jennings* v. *McDonough*, 490 F.3d 1230, 1238 (11th Cir. 2007) 1238; *accord United States* v. *Griggs*, 713 F.2d 672 (11th Cir. 1983) (refusing to recognize a *Brady* claim when the defendant had knowledge of the witness who allegedly made an exculpatory statement even though the State failed to produce the statement in response to the defense's specific request for it).

The Second Circuit likewise has ruled that "[e]vidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Disimone* v. *Phillips*, 461 F.3d 181, 197 (2d Cir. 2006); *see United States* v. *Paulino*, 445 F.3d 211, 226 (2d Cir. 2006); *United States* v. *Jackson*, 345 F.3d 59, 73 (2d Cir. 2003).

Whether the suppressed evidence is publicly available factors into the due process analysis in the First, Seventh, and Eighth Circuits as well. In *United States* v. *Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1999), the First Circuit held that "[t]he government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender, as they were here." *See also Lugo* v. *Munoz*, 682 F.2d 7, 9 (1st Cir. 1982) (prosecution has no duty to disclose evidence that is "a matter of public record" and "readily available to a

diligent defender"); *Ellsworth* v. *Warden*, 333 F.3d 1, 6 (1st Cir. 2003). In *Harris* v. *Kuba*, 486 F.3d 1010 (7th Cir. 2007), the Seventh Circuit held that the State did not suppress evidence under *Brady* where it reasoned that the defense "had evidence that the same weapon was used in the three crimes" and therefore could have discovered the exculpatory evidence from other sources. *Id.* And finally, in *United States* v. *Jones*, 160 F.3d 473, 479 (8th Cir. 1998), the Eighth Circuit held that "information available from other sources or evidence already possessed by a defendant is not covered by the rule" announced in *Brady*. *See United States* v. *Whitehead*, 176 F.3d 1030, 1036 (8th Cir. 1999).

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE ELEVEN-CIRCUIT SPLIT.

The facts of this case cleanly present the issue that has divided the lower courts: whether a prosecutor can suppress exculpatory or impeachment material from the defendant if the material is arguably discoverable by the defendant through some other avenue. This issue significantly shapes the fairness of criminal trials, imposes unrealistic burdens on criminal defendants, and threatens to undermine the core holding of *Brady*, *Strickler*, and *Banks*. And the effect of the Sixth Circuit's rule will be felt on a daily basis in countless disclosure decisions made by prosecutors on the front lines of the criminal justice system.

The dispute in this case revolves around a single piece of evidence: an NCIC report that would have established the exact contours of the three-decade-long criminal record of the prosecution's "key witness." The rule adopted by the Sixth Circuit, and

the other courts on its side of the circuit divide, places significant burdens on already-strained defense counsel, requiring them to independently search throughout criminal dockets and other public records around the country just to unearth evidence already in the State's hands. This rule is profoundly unfair to defendants and returns the law to a time when prosecutorial gamesmanship was tolerated. It requires defendants to duplicate the efforts of the State, thereby unnecessarily draining a defense counsel's resources. Faced with limited resources and immense caseloads,[5] defense counsel must spend even less time developing the defendant's case and instead must divert that effort to retracing the prosecutor's steps, making a vigorous defense more difficult. Prosecutors may affirmatively withhold exculpatory or impeachment material that may be technically available somewhere else, all the while misleading the defendant so that the defendant has no reason to conduct its own independent investigation.

If the decision below stands, an earnest but overwhelmed defense counsel faces a Hobson's choice: he can expend his scarce resources either to

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[5] A defense counsel working in the Legal Aid Society of New York's Bronx office, for example, maintains an open file of approximately 105 cases (50 felonies and 55 misdemeanors) at any given time. The Spangenberg Group, Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services 131 (2006). Public defenders in Louisiana and Massachusetts face maximum workload standards of 200 felonies and 400 to 450 misdemeanors per year, and public defenders in Oregon can expect to handle up to 240 felonies and 400 misdemeanors per year. *See generally id.* at App. K (providing public defender workload standards for fifteen states).

verify the prosecutor's assurances that all available *Brady* material has been turned over, or he can prepare a more thorough defense for his client. The former denies defense counsel the opportunity to thoroughly prepare a defense, and the latter risks never finding exculpatory evidence withheld by the prosecution. The Sixth Circuit's rule is antithetical to a "system constitutionally bound to accord defendants due process," *Banks*, 540 U.S. at 696, and warrants prompt, decisive resolution by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the event the Court grants the petition in *Bell*, No. 07-1506, it may wish to consolidate this case with *Bell*. At the very least, this Court should hold the petition in this case pending the disposition of the petition in *Bell*.

Respectfully submitted,

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